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11	AMERICAN BAPTIST HOMES OF THE WEST) Case No. 32-CA-25247) 32-CA-25248	
12	d/b/a PIEDMONT GARDENS,) 32-CA-25266) 32-CA-25271	
13	Respondent,) 32-CA-25308) 32-CA-25498	
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strikers in order to teach the strikers a lesson and to ensure that it would avoid future strikes by replacing the strikers with individuals it was confident would cross future picket lines. The Union filed an unfair labor practice charge, and the Region issued a complaint, alleging that regardless of whether the strike was an unfair labor practice strike or an economic strike, the employer violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act") when refused to reinstate and/or belatedly reinstated the 38 strikers.

On August, 9, 2011, Administrative Law Judge ("ALJ") Burton Litvack issued his

Decision and Recommended Order in the above matters. The ALJ concluded that the employer,
or "Piedmont Gardens") violated Section 8(a)(1) of the National Labor Relations Act (the "Act")
when it engaged in surveillance and/or created the impression it was engaging surveillance of
employees participating in a strike authorization vote, and Sections 8(a)(1) and 8(a)(5) of the Act
when it discriminatorily enforced a no-access rule and by refusing to furnish relevant and
necessary information to the Union.

With respect to the allegation that the employer violated Sections 8(a)(1) and 8(a)(3) by permanently replacing 38 unfair labor practice strikers, however, the ALJ recommended that the allegation be dismissed. The ALJ failed to find that the August 2 through August 7 strike was motivated, at least, partially by the employer's unfair labor practices. Instead, the ALJ concluded that "bargaining unit employees voted to authorize their negotiating committee to call an economic strike against Respondent and that such remained the entire underlying basis for the August 2 through 7 concerted work stoppage and strike against Respondent." ALJD at p. 25. In so doing, the ALJ not only misconstrued and ignored the evidence, but applied inapposite legal precedent to the instant matters.

All references in this brief to the ALJ's decision will be designated as "ALJD".

In addition, the ALJ rejected an alternative theory of the Section 8(a)(3) violation, premised on the basis that the strike was an economic strike. Despite finding that the employer was motivated by unlawful factors to permanently replace strikers – that is, to teach strikers a lesson and to permanently replace them with workers who would cross future picket lines – the ALJ incorrectly concluded that when "when employees engage in an economic strike against their employer and the said employer exercises its right to hire permanent replacements in the striking employees' stead, whatever factors, lawful or unlawful, contributed to, or motivated, the employer's state-of-mind in reaching its decision, unless designed to accomplish an unlawful, extraneous purpose, are utterly irrelevant." *Id.* at p. 27. The ALJ's decision not only ignores established Board precedent but sanctions and sanitizes an employer's decision to punish economic strikers for exercising their Section 7 rights.

II. LEGAL ARGUMENT

A. THE STRIKERS WERE UNFAIR LABOR PRACTICE STRIKE ON AUGUST 2 THROUGH AUGUST 7 AND, THEREFORE, SHOULD HAVE BEEN REINSTATD UPON THE UNION'S UNCONDITIONAL OFFER TO RETURN TO WORK.

The ALJ's decision is premised on his belief that bargaining unit employees were not motivated to strike by the employer's unfair labor practices. The ALJ first rejects any argument that the strike at its inception was an unfair labor practice strike, and that strikers were even partially motivated to strike to protest the employer's unfair labor practices. *Id.* at p. 22. To support this conclusion, the ALJ reaches back to an informational picket that occurred several months before the strike and one month before the strike authorization vote, where strikers carried placards that identified contentious bargaining issues. *Id.* In addition, the ALJ suggests that although bargaining unit employees participated in a strike authorization vote in June 2010, the bargaining unit members were solely motivated by successor contract bargaining issues when

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they cast their ballot to authorize the bargaining committee to call a "Unfair Labor Practice Strike." Id.

The ALJ discounts the wording of the ballot more out of convenience than for any other reason; the fact that the ballot clearly stated that the strike authorization vote was to authorize the committee to call an unfair labor practice strike is significant, and surely goes to the motivation of those who cast a ballot. Moreover, the fact that workers engaged in a informational picket months before the strike and, at least, a month before the strike authorization vote took place does not shed light on the motivation of those who voted to authorize their bargaining committee to call an unfair labor practice strike. Finally, contrary to the ALJ's finding, the unfair labor practices committed by the employer on the day of the strike authorization vote were disseminated to bargaining unit members after the committee decided to call a strike and informed employees of the decision. (Tr. 249:18-24; Tr. 563:20-25). As such, it cannot be said that the strikers were not unfair labor practice strikers at the inception of the strike.

The ALJ next rejects any argument that the strike "metamorphosized into an unfair labor practice strike." ALJD at p. 22. The ALJ accepts as fact that the bargaining committee, on July 9, 2010, discussed the employer's unfair labor practices when discussing whether or not to engage in a strike against the employer. And there is no question that on the basis of this discussion, the bargaining committee authorized and called a five-day unfair labor practice strike. However, despite this evidence, the ALJ found that the testimony of the bargaining committee as to why they decided to call the strike cannot be imputed to the rest of the bargaining unit. The ALJ's conclusion is wrong for two reasons.

First, it is premised on the fact that bargaining unit employees authorized their bargaining team to call an economic strike. The fact is that bargaining unit employees authorized their bargaining team to call an unfair labor practice strike. At the very least, bargaining unit

employees authorized their bargaining team to call a strike; and on that authorization, the bargaining team called an unfair labor practice strike.

Second, the ALJ incorrectly rests his conclusion on the holding of *Facet Enterprises*, 290 NLRB 152 (1988). *Facet* is distinguishable from the facts of the instant case. In *Facet*, at the strike authorization vote, the Union's President handed out a list of unresolved issues between the employer and the Union; the list contained economic items but no unfair labor practices. *Facet*, 290 NLRB at 153-54. On the basis of this list of grievances, the membership authorized a strike.

Following the strike vote, the International Union Representative sought final approval from the Union's Regional Director, who had final discretion as to whether or not to sanction the strike. *Id.* at 154. The International Representative presented the list of issues to the Union's Assistant Regional Director, but added an issue involving an unfair labor practice. No *members* were aware of that unfair labor practice. *Id.* Later, during a second strike authorization vote the members were informed of the unfair labor practice issue. *Id.*

On these facts, the Board held that from its inception the strike was not an unfair labor practice strike, and did not become one until members were aware of the alleged unfair labor practice. As the Board noted: "We not dispute the notion that unit employees may give standing authorization to their bargaining agents to commence a strike in response to what those agents believe is an unfair labor practice. But we find no evidence that such generalized authority was ever given by the rank-and-file employee to the Local's officers . . . the only grounds offered by the Local's officials dealt with economic reasons." *Id*.

By contrast, here, the bargaining unit employees were not presented with a list of economic items prior to or during the strike authorization vote. Rather, the strike authorization

ballot clearly indicated that the membership was voting to authorize their bargaining team – not their Union representatives – to call an unfair labor practice strike.

Moreover, nothing in *Facet* requires, as the ALJ suggests, "explicit evidence of the bargaining unit employee's knowledge of their employer's alleged unfair labor practices in order to find that an existing strike was, in fact, an unfair labor practice strike." ALJD at p. 24. Indeed, at the very least, the authorization vote was the type of "generalized authority" to call a strike that the Board recognizes may be given by the rank-and-file to the Union's officers or agents.

Finally, even if "explicit evidence" is required, the bargaining team notified employees of the issues that they called the strike over, including issues related to the employer's unfair labor practices.

As such, the 38 strikers were unfair labor practice strikers and should have been immediately reinstated upon the Union's unconditional offer to return to work.

B. THE EMPLOYER PERMANENTLY REPLACED ITS STRIKING EMPLOYEES WITH AN UNLAWFUL PURPOSE UNDER HOT SHOPPES.

For the reasons stated in the Counsel for Acting General Counsel's Brief in Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge, the Board should find that even if the August 2 through August 7 strike was not an unfair labor practice, the employer still violated Sections 8(a)(1) and 8(a)(3) because it permanently replaced strikes with an unlawful purpose under *Hot Shoppes*, 147 NLRB 802 (1964).

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III. CONCLUSION

For the reasons stated above, the Union requests that the Board find merit to the Union's cross-exceptions and find that the employer violated Sections 8(a)(1) and 8(a)(3) of the Act by refusing to or belatedly reinstating 38 strikers.

Dated: October 18, 2011

WEINBERG, ROGER & ROSENFELD A Professional Corporation

By:

BRUCE A. HARLAND Attorneys for Charging Party SEIU, UHW – West

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PROOF OF SERVICE (CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On October 18, 2011, I served the following documents in the manner described below:

SEIU, UNITED HEALTHCARE WORKERS – WEST'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION; and SEIU, UNITED HEALTHCARE WORKERS – WEST'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

- ☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

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I declare under penalty of perjury under the laws of the United States of America that the

foregoing is true and correct. Executed on October 18, 2011, at Alameda, California.

Rhonda Fortier Bourne

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